

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DENNIS W. SOMERVILLE,

Petitioner,

v.

WARDEN MARTINEZ, *et al.*,

Respondents.

Case No. C06-5363RJB/KLS

ORDER DENYING MOTION
FOR CERTIFICATE OF
APPEALABILITY

This matter comes before the Court on the petitioner's Motion for Certificate of Appealability (Dkt. 34). The Court has considered the motion, the response, and the remainder of the file herein.

I. BACKGROUND

Petitioner Dennis W. Somerville is confined pursuant to his conviction following a jury verdict for the crime of Rape in the First Degree on August 8, 2002. On March 19, 2007, the Court adopted the Report and Recommendation and denied the petition. Dkt. 31. Mr. Somerville now seeks a Certificate of Appealability. Dkt. 34. The defendants have opposed the motion, and the petitioner has not replied. *See* Dkt. 36.

II. DISCUSSION

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §

1 2253(c)(2). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas
2 petitioner must show that reasonable jurists could debate whether, or agree that, the petition
3 should have been resolved in a different manner or that the issues presented were adequate to
4 deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
5 (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on its
6 merits, the petitioner must demonstrate that reasonable jurists would find the court's assessment
7 debatable or wrong. *Id.* When the court denies a claim on procedural grounds, the petitioner must
8 show, at least, that reasonable jurists would find it debatable whether the petition states a valid
9 claim of the denial of a constitutional right and that reasonable jurists would find it debatable
10 whether the district court was correct in its procedural ruling. *Id.*

11 **A. EXHAUSTED CLAIMS**

12 The Court held that the petitioner's first, third, and fourth habeas claims were
13 unexhausted. Mr. Somerville conceded that his first and third claims were unexhausted, and the
14 petitioner should not be afforded an opportunity to appeal those claims. *See* Dkt. 30 at 2, 4.

15 The Court held that the petitioner's fourth claim was unexhausted after having "reviewed
16 the Petition and the Motion and f[indin]g no presentation of the petitioner's chain of custody
17 argument as a constitutional issue." Dkt. 31 at 4. The motion does not address this finding and
18 merely reiterates the petitioner's position as to the merits of this claim. A Certificate of
19 Appealability is not warranted as to the petitioner's first, third, and fourth habeas claims.

20 **B. SIXTH GROUND FOR RELIEF**

21 The Court held that Mr. Somerville was afforded an opportunity to litigate his sixth
22 ground for relief in state court. Dkt. 31 at 4. The motion does not contest whether Mr. Somerville
23 was afforded such an opportunity, and the motion should be denied as to the petitioner's sixth
24 claim.

25 **C. SECOND, FIFTH, AND SEVENTH GROUNDS FOR RELIEF**

26 The Court held that Mr. Somerville could not demonstrate a constitutional violation with
27 respect to his second, fifth, and seventh grounds for relief in light of his concession with regard to
28 his identity as the perpetrator. Dkt. 31 at 4. The motion does not contest the impact of Mr.

1 Somerville's concession as to the issue of identity, and the motion should be denied as to these
2 claims.

3 **D. EIGHTH GROUND FOR RELIEF**

4 The Court held that the failure to cross examine two witnesses regarding alleged
5 inconsistencies in their testimony did not constitute ineffective assistance of counsel because the
6 brunt of the testimony was consistent. Dkt. 31 at 4-5. In seeking a Certificate of Appealability, the
7 petitioner offers only a conclusory allegation that the testimony "had differences and conflict[s]." Dkt. 34 at 6. The petitioner fails to demonstrate that reasonable jurists could debate whether, or
8 agree that, this aspect of the petition should have been decided differently.
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10 **E. NINTH GROUND FOR RELIEF**

11 With respect to Mr. Somerville's ninth ground for relief, the Court held that Mr.
12 Somerville failed to demonstrate that conceding Mr. Somerville's guilt as to the rape, but not as
13 to the use of a weapon, constitutes ineffective assistance of counsel. Dkt. 31 at 5. The state court
14 determined that the concession could be upheld as a reasonable trial tactic in light of the strong
15 evidence that Mr. Somerville committed rape and the less compelling evidence as to whether he
16 was armed. The motion fails to offer evidence or argument refuting the Court's determination that
17 the state court's decision was not contrary to, and did not involve an unreasonable application of,
18 clearly established federal law. The motion should be denied in this respect.

19 **F. TENTH GROUND FOR RELIEF**

20 The Court held that Mr. Somerville failed to establish that declining to ask the judge to
21 reopen the defense's case to allow Mr. Somerville to testify after defense rested its case
22 constitutes ineffective assistance of counsel. Dkt. 31 at 6. Mr. Somerville does not demonstrate
23 that reasonable jurists could debate whether, or agree that, this portion of the petition should have
24 been resolved in a different manner or that the issues presented were adequate to deserve
25 encouragement to proceed further.

26 **III. ORDER**

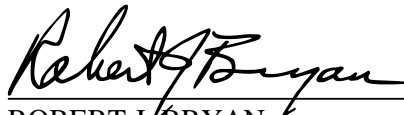
27 Therefore, it is hereby

28 **ORDERED** that the petitioner's Motion for Certificate of Appealability (Dkt. 34) is

1 **DENIED.**

2 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
3 of record and to any party appearing *pro se* at said party's last known address.

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5 DATED this 8th day of May, 2007.



6 ROBERT J. BRYAN
7 United States District Judge
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